No. 262

In the Supreme Court of the United States

October Term, 1956

GOODALL-SANFORD, INC.

Defendant-Appellant, Petitioner

vs.

UNITED TEXTILE WORKERS OF AMERICA, A. F. L., LOCAL 1802, and UNITED TEXTILE WORKERS OF AMERICA, A. F. L.

Plaintiffs-Appellees, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Douglas M. Orr,
301 Eugene Avenue,
Greensboro, North Carolina,
Counsel for Petitioner.

William B. Mahoney,
Wadleigh B. Drummond,
Daniel T. Drummond,
120 Exchange Street,
Portland, Maine,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Goodall-Sanford, Inc., your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on April 25, 1956.

OPINIONS BELOW

The opinion of the District Court is reported in 131 Fed. Supp. 767 and is set forth in full R. 33-43, inc. The opinion of the Court of Appeals is reported in 30 CCH, LC P, 69910 and is printed in full, R. 51-63 and as

Appendix (C) hereto. The opinion in *Local 205, United Electrical R & M. Workers of America vs. General Electric Company*, decided by the Court of Appeals at the same time as the case at bar is reported in 30 CCH, LC P. 69908 and printed as Appendix (B) hereto.

JURISDICTION

The jurisidiction of this Court is invoked under the provisions of 28 U. S. C. A. Par. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U. S. C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collective bargaining agreement.

5. Whether, for the purpose of decision upon a motion by a plaintiff for summary judgment on the pleadings, the allegations of material facts in the defendant's answer are admitted under Rule 56 of the Federal Rules of Civil Procedure.

6. Whether the District Court, in the first instance, or the Court of Appeals, on appeal, in considering a motion for summary judgment on the pleadings, is permitted to disregard material facts so admitted by the motion.

7. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose.

STATUTES INVOLVED

The Statutes involved are the United States Arbitration Act, 61 Stat. 669, Sec. 1 et seq. (1947) as amended September 3, 1954, 68 Stat. 1233, 9 U. S. C. Sec. 1 et seq., the Labor Management Relations Act, 61 Stat. 136 (1947) 29 U. S. C. 141 et seq. and the Norris-LaGuardia Act, 47 Stat. 70 (1932) 29 U. S. C. 101, et seq.

STATEMENT OF THE CASE

The statement of the case, as presented to the District Court is printed R. 33-40, inc. and, in the interest of brevity, is not reprinted here.

The statement of the case, as presented to the Court of Appeals, is printed R. 52-53, inc. and in Appendix (C) and, in the interest of brevity, is not reprinted here.

The case involves a petition by a labor organization to the United States District Court for the District of Maine, Southern Division, to compel specific performance of the arbitration provisions of a collective bargaining agreement between United Textile Workers of America, A. F. L. Local 1802, and United Textile Workers of

America, A. F. L. Plaintiffs, and Goodall-Sanford, Inc., Defendant.

The dispute arose when the Union protested the action of the Company in terminating employment of employees then on lay-off status when, because of heavy losses the defendant corporation had decided to terminate all operations and had inaugurated a program of complete liquidation of the mill properties.

The defendant refused the demand of the Union for arbitration of the dispute on the ground that the dispute was not arbitrable under the collective bargaining agreement.

Termination of all production operation of the mills and the sale of all real estate and buildings had been completed by April 5, 1955, approximately two months prior to the date of decision in the District Court.

The collective bargaining agreement is set forth in full in Exhibit A (R. 26) and the pertinent provisions thereof are quoted in the opinion and order of the District Court of June 1, 1955, R. 35-37, and, in the opinion of the Court of Appeals, R. 55, 58 and 60.

The only ground for jurisdiction of the District Court alleged in the original and amended complaint is Sec. 301 of Title III of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185.

The District Court denied Defendant's motion to dismiss the amended complaint (R. 4) and, on June 1, 1955, denied the defendant's motion to dismiss the complaint, as further amended (R. 5). On June 1, 1955 the District Court entered an opinion and order granting Plaintiffs' motion for summary judgment (R. 31-32)

and, on June 13, 1955, entered a decree directing arbitration of the dispute (R. 43). An appeal to the Court of Appeals for the First Circuit was seasonably perfected by the Defendant from the denial of the Defendant's motion to dismiss and the granting of the Plaintiffs' motion for summary judgment and the decree thereon (R. 45).

No claim was made in the Plaintiffs' original or amended pleadings in the District Court that the Plaintiffs were demanding the relief of specific performance under the United States Arbitration Act, and no allegation or proof of compliance by the Plaintiffs with the requirements of said Act was made. The decision of the District Court was bottomed squarely on its interpretation of the provisions of Section 301, Labor-Management Relations Act, as granting to that Court jurisdiction to grant the relief of specific performance of the arbitration provisions of the collective bargaining agreement.

At no time, in the District Court or in the Court of Appeals, either in the written briefs or in oral argument, was any claim made by the Plaintiffs that relief was sought under the United States Arbitration Act, or that the provisions of that Act had been complied with by the Plaintiffs.

The Court of Appeals disagreed with the District Court as to its authority to compel arbitration under Sec. 301 (R. 55) and held (a) that the United States Arbitration Act applied to the controversy (b) that the Defendant had waived compliance by the Plaintiffs with the requirements of the Arbitration Act (R. 56), (c) that as there was no controverted issue of material fact, summary judgment was the appropriate vehicle for decision (R. 56) and (d) that an arbitrable issue was presented on the facts in the case (R. 63). On April 25, 1956 the

Court of Appeals rendered its opinion, affirming the decree of the District Court (R. 51-63) and, on the same day, entered judgment (R. 63) and, on May 9, 1956, stayed the mandate until further order of Court (R. 63).

ARGUMENT ON REASONS FOR GRANTING THE WRIT

There are special and important reasons for this Court to exercise its sound judicial discretion and to grant the writ of certiorari prayed for in this petition on each of the questions presented.

Argument is made on each of the questions presented as set forth on Page 2 of this petition, and, in the interest of brevity, the questions presented are not repeated as a caption for each subdivision of this argument, but are referred to by number.

Question No. 1

There is a direct conflict between the decisions in the Courts of Appeal and the decision of this Court in the Westinghouse case as to whether Section 301 grants jurisdiction to the district courts, where no other ground for Federal Jurisdiction is alleged or claimed.

Lincoln Mills of Alabama vs. Textile Workers Union of America, CA-5, 230 Fed. 2nd, 81 (1956) holds that Section 301 grants to Federal courts jurisdiction where violation of a collective bargaining agreement between an employer and a labor organization representing employees is asserted. See also *Shirley-Herman Co. vs. Internat'l. Hod Carriers, etc.* CA-2 (1950), 182 F. 2d 806 and *Signal-Stat Corporation vs. Local 475, U.E., Radio and Machine Workers of America (UE)*, CA-2 (7/2/56).

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802, CA-1 (1956) 30 CCH, LC Par. 69, 910; *Local 205 U. E. vs. General Electric Co.*, CA-1 (1956) 30 CCH, LC Par. 69, 908; *Newspaper Guild of Boston vs. Boston Herald Traveler Corporation* CA-1 (1956) 30 CCH, LC Par. 69,909, hold that Section 301 is to be interpreted as denying jurisdiction over such a controversy only where the union is seeking a remedy which the individual employee equally could enforce in a suit on his personal cause of action.

Each of these interpretations is in conflict with the decision of this Court in the Westinghouse case. *Association of Westinghouse Salaried Employees vs. Westinghouse Elec. Corp.*, 348 U. S. 437; 75 Sup. Ct. 488, 99 L. Ed. 368. They are also in conflict with the interpretation of Section 301 in *International Garment Workers' Union, A. F. L. vs. Jay-Ann Co.*, CA5, 228 Fed. 2nd, 632 at 635 (1956).

These conflicts in the decisions can be resolved only by a decision of this Court and it is in the public interest that they be so resolved.

Question No. 2

The Federal Dstrict Courts and Courts of Appeal are in hopeless conflict on the question as to whether Sec. 301 grants to the United States District Courts equitable jurisdiction to grant injunctions or to compel specific performance of arbitration clauses in a collective bargaining agreement.

A compendium of the cases holding either way in each Circuit is printed in Appendix (A).

The cases holding that Sec. 301 does grant equitable jurisdiction are not only in conflict with the decisions in other Circuits which have reached opposite results, but are in direct conflict with the decision of this Court in the Westinghouse Case. *Association of Westinghouse Salaried Employees vs. Westinghouse Elec. Corp.*, 348 U. S. 437; 75 Sup. Ct. 488, 99 L. Ed. 368.

Question No. 3

What has heretofore been said concerning the conflict between the Circuits with respect to Question No. 2 applies with equal force to this Question No. 3.

A compendium of cases holding either way is printed in Appendix (A).

Question No. 4

There is a complete and irreconcilable conflict between the decisions of the Court of Appeals in this case and in the General Electric case, decided at the same time, and the Lincoln Mills case, 230 F. 2nd, 81, CA 5th, 1956. The conflicts between the circuits are pointed up in the opinion of the Court of Appeals in the General Electric Case Appendix (B) (P. 22-23) attached hereto, and in the Lincoln Mills case, Pages 85-86.

We understand that a petition for certiorari to this Court has been, or will be filed in both the General Electric and Lincoln Mills cases.

A compendium of the cases holding that the Arbitration Act is not applicable to a collective bargaining agreement, and of cases holding the Act applicable, and of cases excluding consideration of the applicability of the Arbitration Act because of the Court's decision with respect to

the jurisdiction conferred by Sec. 301, are set forth in Appendix (A) attached hereto.

Questions No. 5-6

It is important that the Federal Rules of Civil Procedure receive uniform application in the Federal Courts.

The Defendant claims that all material facts alleged in the Defendant's answer are admitted for the purpose of decision on the Plaintiffs' motion for summary judgment under Rule 56 and that such admissions of fact cannot be ignored or disregarded in the Court's consideration and decision in the case.

Both the District Court and the Court of Appeals, in deciding that an arbitrable issue was presented by the pleadings in the Defendant's refusal to arbitrate the dispute over the discontinuance of the business and termination of employment of employees by reason thereof (Opinion of District Court, R. 41—Opinion of Court of Appeals R. 63) ignored or disregarded the admission of the Plaintiffs, by their motion for summary judgment, that "the decision to discontinue all operations * * * carried with it also the right to terminate employment of employees *and nothing in the collective bargaining agreement covered, or purported to cover such a cessation of business and termination of employment*". (emphasis supplied) (R. 28).

Under Article VIII B of the collective bargaining agreement between the Plaintiffs and the Defendant (Page 35 of Exhibit A, R. 26), quoted in full (R. 36) only disputes which related solely to the meaning and application of the agreement or any individual grievance could be arbitrated. Since Plaintiffs admitted, for the purpose of

their motion, that there was nothing in the agreement covering such cessation of business and termination of employment, an arbitrable issue could not be presented by the pleadings, unless the Court ignored or disregarded the Plaintiffs' admission.

The Defendant claims that this was such a departure from the accepted and usual course of judicial procedure as to call for this Court's exercise of its power of supervision.

Question No. 7

The Court of Appeals held (R. 59):

> "The District Court found that eligibility for the other benefits described in the complaint — life, health, and accident insurance and pensions — also was related to the employment status, with partial benefits continuing during a lay-off but not if the employment was terminated. See 129 F. Supp. at 864-65. The preliminary injunction granted by the district court in that opinion seems to have afforded the principal relief pertinent to those benefits, and it appears that the vacation pay-vacation bonus issue is the major, if not sole, matter in the case at this time."

Hence, at the time the Court of Appeals rendered its decision the ultimate purpose of the arbitration ordered by the Court could only be a money recovery of damages for failure to pay the vacation pay or bonus to the individual employees entitled thereto.

An order of a Federal Court directing an arbitration for such a purpose would be in direct conflict with the decision of this Court in the Westinghouse case and in

conflict with the decisions in *Textile Workers vs. Williamsport Textile Corp.*, 136 Fed. Supp. 407; *I. L. W. U. 142 vs. Libby, McNeill & Libby*, 221 Fed. 2nd, 225.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted on each of the questions presented.

Respectfully submitted,

DOUGLAS M. ORR,
Counsel for Petitioner.

APPENDIX A

Question No. 2

Cases in which district court is held to have jurisdiction to grant equitable relief under the authority of Section 301 of LMRA.

FIRST CIRCUIT

T. W. U. A. vs. American Thread Co. DC Mass. (1953) 113 F. Supp. 137.

U. T. W. A., Local 1802 vs. Goodall-Sanford, Inc., DC Me. (1955) 131 F. Supp. 767.

SECOND CIRCUIT

Wilson Bros. vs. T. W. U. A. DC SD NY (1954) 132 F. Supp. 163.

Local 207 vs. Landers, Frary & Clark DC Conn (1954) 119 F. Supp. 877.

Durkin vs. John Hancock Mutual Life Insurance Company DC SD NY (1950) 11 FRD 147.

Local 379 vs. Jacobs Mfg. Co., DC Conn (1953) 120 F. Supp. 228.

THIRD CIRCUIT

Independent Petroleum Workers of N. J. vs. Esso Standard Oil Co. CA-3 (6/26/56), 30 CCH. LC Par. 70,064.

Insurance Agents' International Union A. F. of L. vs. Prudential Insurance Co. DC ED Pa (1954) 122 F. Supp. 869.

FOURTH CIRCUIT

T. W. U. A. vs. Arista Mills Co., CA-4 (1951) 193 F. 2d 529.

T. W. U. A. vs. Aleo Mfg. Co. DC MD NC (1950) 94 F. Supp. 626.

SIXTH CIRCUIT

Milk and Ice Cream Drivers vs. Gillespie Milk Products Corp. CA-6 (1953) 203 F. 2d. 650.

Modine Mfg. Co. vs. I. A. M. CA-6 (1954) 216 F. 2d 326.

TENTH CIRCUIT

Mountain States Div. No. 17 C. W. A. vs. Mountain States Tel. & Tel. Co. DC Colo. (1948) 81 F. Supp. 397.

DISTRICT OF COLUMBIA

The Evening Star Newspaper Co. vs. Columbia Typo. Union DC D of C (1954) 124 F. Supp. 322.

APPENDIX A

Question No. 2

Cases in which district court is held not to have jurisdiction to grant equitable relief under the authority of Section 301 of LMRA.

FIRST CIRCUIT

W. L. Mead, Inc. vs. I. B. T., Local Union No. 25 CA-1 (1954) 217 F. 2d 6.

Local 205, U. E. vs. General Electric Company CA-1 (4/25/1956) 30 CCH LC Par. 69,908.

Local 205, U. E. vs. General Electric Company DC Mass (1955) 129 F. Supp. 665.

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802 CA-1 (4/25/56) 30 CCH LC Par. 69,910.

Newspaper Guild of Boston vs. Boston Herald-Traveler Corp. CA-1 (4/25/56) 30 CCH LC Par. 69,909.

Newspaper Guild of Pawtucket vs. Times Publishing Co. DC RI (1955) 131 F. Supp. 499.

SECOND CIRCUIT

Alcoa S. S. Co. Inc. vs. McMahon, CA-2 (1949) 173 F. 2d 567.

Local 937 vs. Royal Typewriter Co. DC Conn (1949) 88 F. Supp. 669.

THIRD CIRCUIT

Duris vs. Phelps Dodge Copper Products Corp. DC NJ (1949) 87 F. Supp. 229.

FOURTH CIRCUIT

Amazon Cotton Mill Co. vs. T. W. U. A. CA-4 (1948) 167 F. 2d 183.

Matson Navigation Co. vs. Seafarers International Union DC Maryland (1951) 100 F. Supp. 730.

Pilot Freight Carriers vs. Bayne DC WD SC (1954) 124 F. Supp. 605.

FIFTH CIRCUIT

Lincoln Mills vs. T. W. U. A. CA-5 (1956) 230 F. 2d 81.

T. W. U. A., CIO vs. Berryton Mills, DC ND Ga. (1951) 20 CCH LC Par. 66519.

SEVENTH CIRCUIT

United Packing House Workers of America vs. Wilson & Co. DC ND Ill. ED (1948) 80 F. Supp. 563.

NINTH CIRCUIT

I. L. W. U., Local 142 vs. Libby, McNeill & Libby CA-9 (1955) 221 F. 2d 225.

Associated Tel. Co. Ltd. vs. C. W. A. DC SD Cal (1953) 114 F. Supp. 334.

Castle & Cooke Terminals Ltd. vs. Local 137, I. L. W. U. DC Hawaii (1953) 110 F. Supp. 247.

Sound Lumber Mill Co. vs. Local Union DC ND Cal ND (1954) 122 F. Supp. 925.

I. L. W. U. vs. Sunset Line & Twine Co. DC ND Cal SD (1948) 77 F. Supp. 119.

APPENDIX A

Question No. 3

Cases in which Norris-LaGuardia Act is held to preclude granting injunctive relief under Sec. 301 of LMRA.

FIRST CIRCUIT

W. L. Mead, Inc. vs. I. B. T. Local Union No. 25 CA-1 (1954), 217 F. 2d 6.

Local 205 U. E. vs. General Electric Co. DC Mass (1955) 129 F. Supp. 665.

SECOND CIRCUIT

Alcoa S. S. Co. Inc. vs. McMahon CA-2 (1949) 173 F. 2d 567.

Local 937 vs. Royal Typewriter Co. DC Conn (1949) 88 F. Supp. 669.

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Duris vs. Phelps Dodge Copper Products Corporation DC NJ (1949) 67 F. Supp. 229.

FOURTH CIRCUIT

Amazon Cotton Mill Co. vs. T. W. U. CA-4 (1948) 167 F. 2d 183.

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SEVENTH CIRCUIT

United Packing House Workers of America vs. Wilson & Co. ND Ill ED (1948) 80 F. Supp. 563.

EIGHTH CIRCUIT

Amalgamated Association vs. Dixie Motor Coach Corp. CA-8 (1948) 170 F. 2d 902.

NINTH CIRCUIT

California Assn. of Employers vs. Building and Construction Trades Council CA-9 (1949) 178 F. 2d 175.

Associated Tel. Co. Ltd. vs. C. W. A. DC SD Cal CD (1953) 114 F. Supp. 334.

Castle & Cooke Terminals Ltd. vs. Local 137, I. L. W. U. DC Hawaii (1953) 110 F. Supp. 247.

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T. W. U. A. vs. American Thread Co. DC Mass (1953) 113 F. Supp. 137.

SECOND CIRCUIT

Wilson Bros. vs. T. W. U. A. DC SD NY (1954) 132 F. Supp. 163.

Local 207 vs. Landers, Frary & Clark DC Conn (1954) 119 F. Supp. 877.

THIRD CIRCUIT

Independent Petroleum Workers of N. J. vs. Esso Standard Oil Co. CA-3 (6/26/56), 30 CCH, LC Par. 70,064.

FIFTH CIRCUIT

Lincoln Mills vs. T. W. U. A. CA-5 (1956) 230 F. 2d 81.

SIXTH CIRCUIT

Milk & Ice Cream Drivers Union vs. Gillespie Milk Products Corp. CA-6 (1953) 203 F. 2d 650.

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Mountain States Div. No. 17 C. W. A. vs. Mountain States Tel. & Tel. Co. DC Colo (1948) 81 F. Supp. 397.

DISTRICT OF COLUMBIA

The Evening Star Newspaper Co. vs. Columbia Typo. Union DC D of C (1954) 124 F. Supp. 322.

APPENDIX A

Question No. 4

Arbitration Act Not Applicable to Collective Bargaining Agreements.

FIRST CIRCUIT

Boston & Maine Trans. Co. vs. Amalgamated Assn. of Street and Electric Railway and Motor Coach Employees of America, Division No. 718, et al. 106 Fed. Supp. 334 (1952).

Newspaper Guild of Pawtucket vs. Times Publishing Co., 131 Fed. Supp. 499 (1955).

SECOND CIRCUIT

Shirley Herman Co., Inc. vs. International Hod Carriers Building and Common Laborers of America, Local Union No. 210, 182 Fed. 2nd, 806 (1950).

THIRD CIRCUIT

Amalgamated Assn. of Street Ry. and Motor Coach Employees of America, Local Div: 1210 vs. Penn. Greyhound Lines, Inc., 192 Fed. 2nd, 310 (1951).

Penn. Greyhound Lines, Inc. vs. Amalgamated Assn. etc. 193 Fed. 2nd, 327 (1952).

Ludlow Mfg. & Sales Co. vs. Textile Workers Union of America, CIO, 108 Fed. Supp. 45 (1952).

FOURTH CIRCUIT

United Electrical Radio & Machine Workers of America, et al vs. Miller Metal Products, Inc. 215 Fed. 2nd, 221 (1954).

FIFTH CIRCUIT

Lincoln Mills of Alabama vs. Textile Workers of America, CIO 230 Fed. 2nd, 81 (1956).

SIXTH CIRCUIT

Gatliff Coal Co. vs. Cox, 142 Fed. 2nd, 876 (1944).

EIGHTH CIRCUIT

W. R. Grimshaw Co. vs. Nazareth Literary & Benevolent Institution. 113 Fed. Supp. 564 (1953).

TENTH CIRCUIT

Mercury Oil Refining Co. vs. Oil Workers Intl. Union CIO, 187 Fed. 2nd, 980 (1951).

APPENDIX A

Question No. 4

Arbitration Act Applicable to
Collective Bargaining Agreements.

FIRST CIRCUIT

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802, CA-1 (1956) 30 CCH, LC Par. 69, 910.

Local 205 U. E. vs. General Electric Co. CA-1 (1956) 30 CCH, LC Par. 69,908.

Newspaper Guild of Boston vs. Boston Herald-Traveler Corporation CA-1 (1956) 30 CCH, LC Par. 69,909.

SECOND CIRCUIT

Signal-Stat Corporation vs. Local 475, U. E., Radio and Machine Workers of America (UE), CA-2 (7/2/56).

Lewittes & Sons et al vs. United Furniture Workers of America, CIO et al, 95 Fed. Supp. 851 (1951).

Wilson Brothers vs. Textile Workers Union, 132 Fed. Supp. 163 (1954).

Markel Electric Products, Inc. vs. United Electrical Radio & Machine Workers of America, V. E. 202, Fed. 2nd, 435 (1953).

THIRD CIRCUIT

United Office & Professional Workers of America, CIO vs. Monumental Life Insurance Co., 88 Fed. Supp. 602 (1950).

Harris Hub Bed & Spring vs. United Electrical Radio & Machine Workers of America, V. E. et al, 121 Fed. Supp. 40 (1954).

Tenney Engineering Co., Inc. vs. United Electrical Radio & Machine Workers of America, V. E. Local 437, 207 Fed. 2nd, 450 (1953).

SIXTH CIRCUIT

Hoover Motors Express Co., Inc. vs. Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, et al 217 Fed. 2nd, 49 (1954).

Arbitration Act Excluded or Not Considered Because of Sec. 301 of LMRA 1947.

FIRST CIRCUIT

Industrial Trades Union of America vs. Woonsocket Dyeing Co., Inc. 122 Fed. Supp. 872 (1954).

T. W. U. A. vs. American Thread Co. D.C. Mass. (1953) 113 F. Supp. 137.

SECOND CIRCUIT

Local 207 United Electrical Radio & Machine Workers of America vs. Landers & Frary & Clark, 119 Fed. Supp. 877 (1954).

D. C. CIRCUIT

The Evening Star Newspaper Co. vs. Columbia Typographical Union No. 101, 124 Fed. Supp. 322 (1954).

SIXTH CIRCUIT

International Union United Automobile Aircraft & Agriculture, et al vs. Buffalo-Springfield Roller Co., 131 Fed. Supp. 667 (1954).

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 4980.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

PLAINTIFF, APPELLANT,

v.

GENERAL ELECTRIC COMPANY,
(TELECHRON DEPARTMENT, ASHLAND, MASSACHUSETTS),

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES SUPREME COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

OPINION OF THE COURT.

April 25, 1956.

MAGRUDER, *Chief Judge*. This case, together with two others also decided today, presents the question of whether a federal district court has authority, under § 301 of the Labor Management Relations Act of 1947 (61 Stat. 156), to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such "employer and a labor organization representing employees in an industry affecting commerce."

Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

> "1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. . . . "

The Article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work

was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under § 301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. § 1291, from the final order of April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

I.

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 217 F.2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that § 301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in § 4 of the Norris-LaGuardia Act even in a case where such activities constitute

a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in § 4. However, consideration must also be given to § 7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.* See also §§ 8 and 9. If it is not implicit in our discussion in the *Mead* case, *supra,* we now affirm that our determination there that enactment of § 301 did not by implication repeal § 4 of the Norris-LaGuardia Act applies as well as to § 7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F.2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of § 4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under § 301 must also not "trench upon the interdictions of" § 7, when that section

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*"Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge hereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

and the Act of which it is a part are applicable according to their own terms.

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of § 13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controvery between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, supra, 217 F.2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Althoug the present controversy is a "labor

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Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . ." (47 Stat. 71-72)

dispute" within the scope of the Act as defined in § 13, the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers of § 7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction;" for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies § 2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which § 7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. *E.g.*, *Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (C.A. 2d, 1949); *Associated Telephone Co., Ltd.* v. *Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford* v. *Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills* v. *Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. § 1292. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predeces-

sors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. § 1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also *Goodall-Sanford, Inc.* v. *United Textile Workers*, No. 5029, decided today.

It is significant, while still at the verbal level, that within the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§ 4, 5, 7, 9, 10) or "injunctive relief" (§ 8). In contrast is § 3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in § 7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not worthy

of comment. *Syres* v. *Oil Workers Union*, 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of § 7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also § 9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by § 8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50

(1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A. 2d, 1955), and *Local 207* v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co.* v. *System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co., Ltd.* v. *Communication Workers*, supra; *International Longshoremen's Union* v. *Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F.2d 225 (C.A. 9th, 1955). Nor does our conclusion rest on similar decisions granting relief, such as *Textile Workers Union* v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F.2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, supra (§ 4 activity, as in the *Mead* case); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition,

there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL* v. *Western Union Telegraph Co.*, 179 F.2d 535 (C.A. 6th, 1950); *Textile Workers Union* v. *Arista Mills Co.*, 193 F.2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§ 1 *et seq.*), which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia Act] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1933); cf. *Local 207* v. *Landers, Frary & Clark*, supra, 119 F. Supp. at 879; *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an order to compel arbitration is neither barred specifically by § 4 nor subject to the requirements of § 7, means that such an order could be granted against either party to a labor dispute without violating the Act. The same is true

of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike, however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, supra, 321 U.S. at 62-63; *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald* v. *Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

II.

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under § 301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that § 301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a § 301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if § 301 created a "generally applicable and uniform federal substantive right," as well as "a remedy . . . and . . . a forum in which to enforce it," as the enactment was described in *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a § 301 case may have to determine at least some substantive issues by refer-

ence to state law—which possibly is so—then the problem of choice of law governing the "forms and mode" of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union* v. *American Thread Co.*, supra, 113 F. Supp. at 141-42, relying on "the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109. . . ."

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that "the remedy by arbitration . . . substantially affects the cause of action created by the State," 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided accordinng to state law, as if the district court were "only another court of the State." In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under § 301. As we explained in our second opinion in the *Mead* case, *supra*, decided March 6, 1956, jurisdiction in a § 301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases "in Law and Equity, arising under . . . the Laws of the United States. . . ."

Prior to the *Erie* decision, it was well accepted that the

means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 277-79 (1943) (U. S. Arbitration Act). The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have emphasized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. *E.g.*, see *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 101; *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law, *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as part of the "general maritime law" enforceable in admiralty, *Levinson* v. *Deupree*, 345 U.S. 648 (1953). See *Doucette* v. *Vincent*, 194 F.2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a § 301 case the *Erie*-*York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-*Erie* cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by § 301 itself must be

complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," 17 U. Chi. L. Rev. 233, 240-42 (1950). In Massachusetts, it is not at all clear what is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, § 14, *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G.L. (Ter. Ed.) C. 150, § 11, *Magliozzi* v. *Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

III.

This brings us to the availability and appropriateness, as a federal equitable remedy in a § 301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific

performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line* v. *Atlantic Fruit Co.*, supra, 264 U.S. at 120-23; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could over-

rule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that § 301 itself is a legislative authorization for decrees of specific performance of arbitration agreements. *E.g., Textile Workers Union* v. *American Thread Co.*, supra; *Wilson Bros.* v. *Textile Workers Union*, supra; *Local 207* v. *Landers, Frary & Clark*, supra; *The Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, supra. We think that is reading too much into the very general language of § 301. The terms and legislative history of § 301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting § 301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case Judge Wyzanski deemed the U.S. Arbitration Act inapplicable, but no sooner had he ruled that § 301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of § 5 of the U.S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. Thus it seems to us

that a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

IV.

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in § 1, provides that:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

If a suit is brought in a federal court, and the court "being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," § 3 requires that it "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in § 4 in these terms:

> "A party agrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§ 6-8, 12-13. As already noted, § 5 provides a method for appointing an arbitrator where necessary. Finally, §§ 9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§ 2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that § 2 defines the scope of § 3, on a basis that implicitly reaches § 4, as well. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under § 4 is available only as to an arbitration agreement contained in the types of contracts defined by § 2 as qualified by § 1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of § 2. For the Court ruled § 2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01):

> "Nor does this contract evidence 'a transaction involving commerce' within the meaning of § 2 of the Act. There is no showing that petitioner while performing

> his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to § 2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of § 2. Although it does not consummate the employment relationship, which may be the "transaction," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 1 U.S. 1 (1937); *J. I. Case Co.* v. *NLRB* 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of § 2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Aribtration Act," 17 Law & Contemp. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part thereof," as provided in § 2 of the Arbitration Act. See *Metal Polishers Union* v. *Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement. . . ."

Section 2, however, must be read in connection with § 1, which, after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

"but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of § 1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co.* v. *NLRB.*, supra, 321 U.S. at 334-35:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment.*" [Italics added.]

Compare the language used in § 3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee. . . ." (47 Stat. 70) But see *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310, 313 (C.A. 3d, 1951), 65 Harv. L. Rev. 1239 (1952). See also Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 595-97.

If the words of § 1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F.2d 450, 452 (C.A. 3d, 1953), with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. § 651), we cannot attribute much force to it against a reading of the statutory language itself.

Court decisions are divided on the breadth of the exclusion in § 1 of the U. S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (C.A. 3d, 1951); *United Electrical Workers.* v. *Miller Metal Products, Inc.*, 215 F.2d 221 (C.A. 4th, 1954); *Lincoln Mills* v. *Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co.* v. *Oil Workers Union*, 187 F.2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1959). But cf. *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F.2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F.2d 450 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under § 3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc.* v. *Teamsters Union*, 217 F.2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers* v. *Oliver Corp.*, 205 F.2d 376, 385 (C.A. 8th, 1953); *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc.* v. *United Electrical Workers*, supra, 207 F.2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, *supra*, 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statu-

tory provisions as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico* v. *The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in § 1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment," and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of § 4 which authorizes specific enforcement of an agreement to arbitrate by a district court, "which, *save for such agreement*, would

have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties. . . . . " [Italics added.] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under § 301 to adjudicate directly between union and employer a controversy over "terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of § 4, to compel arbitration of that dispute. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from § 301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from the individual contract between the employer and employee." 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union can effectively seek redress, and for whose breach § 301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under § 301 shows that if cases seeking to compel an employer to arbitrate were throw into the discard along with

Westinghouse-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of § 301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of § 4 will be satisfied by a complaint which meets the terms of § 301 itself. Cf. *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 166.

V.

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to

set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, *e.g., International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co., Inc.*, 168 F.2d 33 (C.A. 4th, 1948); *Markel Electric Products, Inc.* v. *United Electrical Workers*, supra (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, *e.g., Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 164-65; *Insurance Agents' Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§ 3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act. See, *e.g., Local 379* v. *Jacobs Mfg. Co.*, 120 F. Supp. 228 (D.Conn. 1953). See also *Goodall-Sanford, Inc.* v. *United Textile Workers*, No. 5029, decided today.

VI.

Plaintiff has submitted a motion to this court, under 28 U.S.C. § 1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union

and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision, this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue* v. *Kenney*, 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp.* v. *Local 259*, 63 F. Supp. 411, 413 (D. Mass. 1945).

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 5029.

GOODALL-SANFORD, INC.,
DEFENDANT, APPELLANT,

v.

UNITED TEXTILE WORKERS OF AMERICA, AFL, LOCAL 1802 ET AL.,
PLAINTIFFS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE.
[129 F. Supp. 859; 131 F. Supp. 767]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

William B. Mahoney, with whom *Daniel T. Drummond, Jr.*, *Douglas M. Orr*, and *Drummond & Drummond* were on brief, for appellant.

Sidney W. Wernick, with whom *Berman, Berman & Wernick* was on brief, for appellees.

OPINION OF THE COURT.
April 25, 1956.

MAGRUDER, *Chief Judge*. This case is the third one decided today on problems relating to the power of a federal district court to compel arbitration in accordance with a collective bargaining agreement. However, the instant case reached this court in a posture different from that of the other two; and it involves additional considerations not present in *Local 205, United Electrical Workers* v. *General Electric Co.*, No. 4980,

or *Newspaper Guild* v. *Boston Herald-Traveler Corp.*, No. 4983.

Plaintiffs herein, a local labor organization and its parent national union, represented employees of defendant Company at plants in Sanford and Springvale, Maine, in an industry affecting commerce. The last collective bargaining agreement between the parties, as renewed in June, 1954, provided that it was to "continue in full force and effect" until July 15, 1955. The past tense is used advisedly, for defendant, because of continued heavy losses, commenced to terminate all operations at its Sanford and Springvale mills and inaugurated a program of liquidation during the second half of 1954. Production was limited to "running out" products in process, at the completion of which the several mills were shut down completely. By April, 1955, all production operations had ended and all of the real estate and buildings had been sold; the corporation was to go out of existence after liquidating completely.

On December 29, 1954, and February 18, 1955, certain groups of employees, (totaling approximately 1400) were notified that their respective employment with the Company was being terminated as of those dates and that their names were being removed from the payroll records. Although the workers were already on lay-off status, those actions were significant with respect to various "fringe benefits" provided in the collective bargaining agreement, including group life, medical, and hospitalization insurance, pensions, and vacation pay. The Union protested each of these notifications, achieving a month's delay as to the first group of terminations, and subsequently it requested arbitration of the entire problem in accordance with the contract, which will be described in some detail later in this opinion. The Company declined to

arbitrate, deeming the terminations not an arbitrable matter under the contract. On March 15, 1955, the Union filed its complaint in the present action, invoking § 301 of the Taft-Hartley Act (61 Stat. 156) as the basis for jurisdiction, and praying for an order to compel arbitration and for interlocutory injunctive relief. A restraining order and a preliminary injunction were granted, 129 F. Supp. 859, which forbade the termination, but on May 20, 1955, Judge Clifford dissolved the preliminary injunction. No questions touching upon the granting or dissolving of the injunction are presented on this appeal. In an opinion and order of June 1, 1955, 131 F. Supp. 767, the district court granted the Union's motion for summary judgment on its prayer for specific performance of the arbitration provision, and subsequently entered a decree which will be described later. The Company appeals from that decree.

I.

At the outset we must note a question as to whether the order and decree of the district court are appealable. The decree recites, as did the arbitration provision of the contract, that the decision of the arbitrator "shall be final and binding" on the parties. Thus it seems that the court did not intend to reserve jurisdiction to confirm the arbitrator's decision. Perhaps it could not have done so with respect to this contract calling for a "final and binding" award, since the Arbitration Act, 9 U.S.C. § 9, seems to authorize confirmation of an award by summary proceedings in the district court only when the contract includes an express stipulation for entry of judgment upon the award. See *Hyman v. Pottberg's Executors*, 101 F.2d 262, 266 (C.A. 2d, 1939); *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F.2d 1038 (C.A.D.C. 1932); S. Rep. No. 536, 68th Cong., 1st Sess. 4 (1924). It must be recognized,

however, that even without a reservation of jurisdiction to confirm the eventual award, a decree ordering parties to arbitrate obviously does not purport to adjudicate the merits of the controversy or finally terminate it. And where arbitration is sought through the related procedure for stay of a pending action pursuant to § 3 of the Arbitration Act, an appeal prior to the arbitration is only available, under 28 U.S.C. § 1292(1), whether the stay is granted or denied, if the pending action was "legal" rather than "equitable" in character. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955). The appeal at that stage may be unavailable under the test of the *Baltimore Contractors* case even where a request for an affirmative order compelling the other party to arbitrate was joined with the request for a stay. *Wilson Bros.* v. *Textile Workers Union*, 224 F.2d 176 (C.A. 2d, 1955); *Turkish State Railways Administration* v. *Vulcan Iron Works*, 230 F.2d 108 (C.A. 3d, 1956); cf. *Schoenamsgruber* v. *Hamburg American Line*, 294 U. S. 454 (1935) (§ 8). Chief Judge Clark has suggested that where an order to compel arbitration is granted in an independent proceeding under § 4, the appeal likewise should be denied, not only to make availability of appeal more consistent with the practice under other sections of the Arbitration Act, but also because an appeal prior to the arbitration may be "disruptive and delaying." See *Stathatos* v. *Arnold Bernstein Steamship Corp.*, 202 F.2d 525, 527 (C.A. 2d, 1953). There is much force to this view, although we doubt that a completely consistent pattern of appeal could be achieved in view of the variant situations illustrated by the cases already cited. At any rate, we are more persuaded by some of the older precedents, which viewed a § 4 proceeding as completed upon the granting of the only relief sought, an order of the court compelling arbitration, and thus held that order to be "final" in the sense of 28 U.S.C. § 1291.

Krauss Bros. Lumber Co. v. *Louis Bossert & Sons, Inc.*, 62 F.2d 1004 (C.A. 2d, 1933); *Continental Grain Co.* v. *Dant & Russell, Inc.*, 118 F.2d 967 (C.A. 9th, 1941). This holding, which we adopt here, contributes consistency at least to the extent that appeal is equally available whether the court grants or denies an order to arbitrate, for dismissal of a § 4 petition on the merits is clearly a final judgment.

II.

The district court did not proceed under the Arbitration Act (9 U.S.C. §§ 1 *et seq.*) in this case, but found its authority to compel arbitration in § 301, relying upon some of the decisions discussed in our opinion today in *Local 205* v. *General Electric Co.*, No. 4980. For the reasons stated in the latter opinion, we do not accept this approach. But our holding in the *General Electric* case applies here; if the terms of the Arbitration Act are satisfied, the decision to compel arbitration was within the power of the district court.

It would be merely dilatory at this stage to remand this case for amendment of pleadings to allege compliance and defenses under the Arbitration Act. In the other two cases decided today, wherein the district court had denied an order to arbitrate, remand for a decision on the merits was necessary, and so affording an opportunity to amend was appropriate. Here the district court has ruled on the merits, and we may proceed to review that decision, after determining from the record that the case substantially complies with the requisites of the Arbitration Act.

The arbitration clause at issue comes within the scope of § 2 of that Act. Article VIII of the contract provides that

> "any dispute which relates solely to the meaning and application of this Agreement or any individual grievance

> may be referred to arbitration by written notice by either party to the other. . . . Arbitration shall be in accordance with the following procedure: . . .
>
> 2. The Arbitrator shall have no power to add to or to subtract from the terms of this Agreement. . . ."

The four-step grievance procedure that precedes arbitration in Art. VIII was not carried out here, although conferences somewhat equivalent to step 4 took place. At any rate, the Company may be taken to have waived compliance with that procedure by its failure to allege that ground in resisting arbitration in the court below. The proceedings in that court in substance were equivalent to the procedure of § 4 of the Act. There was no issue over "the making of the agreement for arbitration or the failure to comply therewith," other than the question of arbitrability of the dispute. This the court determined upon motion for summary judgment. Since there was no controverted issue of material fact and the question of arbitrability turned only upon interpretation of the written contract, summary judgment was an appropriate vehicle for the decision, not inconsistent with the provision of § 4 for trial to a jury or the court of controverted issues regarding the making or breach of the agreement to arbitrate. See also part IV of our opinion in the *General Electric* case.

The decree ordered the parties to agree upon a person to serve as arbitrator but provided for selection of an arbitrator by the court if the parties failed to agree upon one within ten days. The order to select an arbitrator was consistent with Art. VIII of the contract, and the power of the court to make the appointment in the event the parties failed to do so is expressly conferred by § 5 of the Arbitration Act. The decree also provided, as already noted, that the award was

to be "final and binding," and it framed the questions to be submitted to arbitration as follows:

> "*a.* Did Goodall-Sanford, Inc. violate the collective bargaining agreement . . . [by taking the action described at the beginning of our opinion] . . . ;
>
> *b.* If a violation of contract was committed by Goodall-Sanford, Inc. what must be done by Goodall-Sanford, Inc. appropriately and fully to remedy the said wrong to the employees affected, in accordance with the terms and provisions of the entire collective bargaining agreement."

This formulation of the issues in dispute is accurate and serves to limit the arbitrator to the matters deemed arbitrable by the court, a limitation of which defendant cannot complain. Defendant has argued here that the second question, taken with the provision for finality, is somehow improper. We do not understand this. Arbitrators conventionally award appropriate relief, upon finding a breach of contract; there would be little point to arbitration otherwise, and the parties must have understood that in placing an arbitration clause in their collective bargaining agreement. The contract itself provides for finality of an award, so that provision of the decree has no particular effect. Of course, despite "finality" an award is subject to some degree of judicial review through 9 U.S.C. §§ 10-11 or other appropriate proceedings. See *Hyman* v. *Pottberg's Executors*, supra, 101 F.2d at 266.

In summation, we find no jurisdictional or procedural error in the action of the district court, nor any substantial deviation from the procedure that would have been followed under the Arbitration Act. Accordingly, we turn to the merits of the decision below.

III.

The "merits" of a suit to compel arbitration, of course, do not include the ultimate issues of contract interpretation that determine the outcome of the controversy. Those are what the arbitrator will decide. What we must pass on here is only the district court's determination that the controversy is arbitrable. The court held "that the dispute relates to the 'meaning and application' of the agreement and that the contentions of the parties in this respect are not frivolous but are fairly and justly maintained and advanced." 131 F. Supp. at 771. It will be helpful now to set forth the relevant provisions of the contract. The arbitration paragraph itself was quoted in the last part of this opinion and so will not be repeated. It will also be recalled that the collective bargaining agreement had been extended in June, 1954, to "continue in full force and effect" until July 15, 1955.

Article VII, entitled "Termination of Employment," stated as follows:

> "A. Reasons for Termination: An employee's continuous service and his employment with the Company shall be terminated by:
>
> 1. Voluntary Quit.
>
> 2. Discharge for cause.
>
> 3. Absence from work for a period of eighteen (18) months or more for any reasons other than to fill a Union position to which the employee was elected or appointed or where an entire operation has been discontinued."

Eligibility to be paid for the annual summer vacation was given in Art. V in these terms:

"B. Eligibility Requirements: During the term of this agreement an employee on the payroll of the Company on June 1st of the vacation year and who has worked at least 900 hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year (both dates included) shall be eligible for vacation with pay. . . ."

Subsequent paragraphs provided for the computation of the amount of "vacation pay" on the basis of the average hourly earnings of employees in the last week or month preceding June 1 in which they worked, and for payment of a "vacation bonus," a percentage of wages for the year ending June 1, to employees who had been "in the continuous employment of the Company" for certain periods but who did not qualify for vacation pay under the foregoing provisions.

It will be seen that eligibility for vacation pay or vacation bonus was tied to existence of the employment status on a given date, June 1, regardless of whether the employee had worked continuously throughout the preceding year or was working on the date in question, with vacation pay as such limited to those who had worked at least 900 hours during the year (approximately 23 weeks on the normal workweek of Art. III). The district court found that eligibility for the other benefits described in the complaint—life, health, and accident insurance and pensions—also was related to the employment status, with partial benefits continuing during a lay-off but not if the employment was terminated. See 129 F. Supp. at 864-65. The preliminary injunction granted by the district court in that opinion seems to have afforded the principal relief pertinent to those benefits, and it appears that the vacation pay-vacation bonus issue is the major, if

not sole matter in the case at this time. The injunction was lifted on May 20, 1955, and counsel informed us at the argument that the Company carried out the termination of the employment of the persons involved before June 1. The Union's contentions are that this action (delayed since February by the injunction) violated the provisions of Art. VII as to how employment may be terminated, and that those provisions are exclusive. The Company argues to the contrary.

In addition, both the Union and the Company may find support in other articles of the contract, such as these:

"ARTICLE I

D. Rights of Management: The management of the Company's business, including . . . the direction of its working force and the right to hire, lay-off and suspend employees is vested exclusively in the Company, subject to the provisions of this agreement."

"ARTICLE XIII

. . . this Contract contains all matters on which the parties are mutually agreed. If at any time while this agreement is in effect the parties desire to modify, amend, or add to it in any respect either retroactively or prospectively they may do so by mutual assent. . . ."

"ARTICLE XVI

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties

after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement."

It is not our function here to determine whether a reconciliation of all these contract provisions will support or refute the Union's conteptions. We believe that the provisions set forth at length above do indicate, as the district court held, that the facts of this case involve a "dispute which relates solely to the meaning and application" of the contract, in the words of the arbitration clause, and that the contentions of the party seeking arbitration thereunder are not frivolous or baseless.

However, defendant argues that well-settled law entitles an employer to shut down an unprofitable business and terminate the employment of its employees, so that the termination of employment under those circumstances cannot create an arbitrable issue under a collective bargaining agreement. The point is well stated in defendant's brief in these words:

"A collective bargaining agreement is a living thing to govern the relationship of the parties during the life of the agreement while the business is being operated as

> a going business. It certainly does not bind the employer to carry on an unprofitable business. The decision to completely and finally discontinue an unprofitable business is a function of management and the collective bargaining agreement was not designed to limit that function."

It may be that existence of a collective agreement with a union for a fixed term does not affect the common law status of the individual employments as contracts terminable at will, except in so far as the union contract expressly limits the employer's power to terminate. See *United States Steel Corp. v. Nichols*, 229 F.2d 396 (C.A. 6th, 1956); 1 Teller, Labor Disputes and Collective Bargaining § 169 (1940). And it may also be that, as a result, the act of terminating employment because a department or an entire business is closed cannot be prevented, or made the basis for liability to a lawsuit or to arbitration under a "discharge for cause" provision of a union contract. See *Local Union No. 690 v. Ford Motor Co.*, 113 F. Supp. 834 (E.D.Mich. 1953); *Machine Printers Beneficial Assn. v. Merrill Textile Print Works, Inc.*, 12 N.J. Super. 26, 78 A.2d 834 (App.Div. 1951); *Industrial Trades Union v. Woonsocket Dyeing Co., Inc.*, 122 F. Supp. 872 (D.R.I. 1954). We do not have to make a decision on either of those propositions, for the situation before us is distinguishable.

It cannot be doubted that a collective bargaining agreement could be drawn to cover the problems arising in the eventuality of an employer's going out of business. For example, see the collective bargaining agreement dealt with in *Byerly v. Duke Power Co.*, 217 F.2d 803 (C.A. 4th, 1954). Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the

form of "fringe benefits," some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern. See *Matter of Potoker*, 286 App.Div. 733, 146 N.Y.S.2d 616 (1st Dept. 1955). Here the eligibility for vacation pay was stated in Art. V to be dependent on existence of the employment relationship on a given date, prior to the end of the contract term. The parties must have contemplated that on this date particular employees might have been away from work for a considerable time subsequent to completion of the minimum 900 hours of work whereby they had earned the vacation pay. Without deciding whether this contract term does have continued effect in the circumstance of the employer's good faith decision to terminate all operations prior to June 1, 1955, we hold that the question thus posed is an arbitrable one under this contract on the facts of this case. Cf. *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D.N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A.2d, 1955); *Matter of Potoker*, supra.

The decree of the District Court is affirmed.